THE SUPREME COURT

Record No. 186/2008

Murray CJ.

Denham J.

Hardiman J.

Geoghegan J.

Fennelly J.

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964 AND IN THE MATTER OF THE FAMILY LAW ACT, 1995
AND IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT, 1991
AND IN THE MATTER OF HUGH LARKIN, AN INFANT

BETWEEN:

J. MCD.

APPLICANT/APPELLANT

- AND -

P. L. AND B. M.

RESPONDENTS

JUDGMENT of Mr. Justice Fennelly delivered the 10th day of December 2009.

1. This appeal concerns the rights of the biological father of a male child (hereinafter "the child"), born as a result of sperm donation and artificial insemination as well as the rights of the child. Sperm was provided to the child's mother who is in a long-term same-sex relationship with another woman.

2. By Order dated October 24th 2008 the Attorney General was joined by this Court as a notice party to the proceedings, having regard to the significance and novelty of the legal issues. The Attorney has made important written submissions on a number of the key issues. Some of these issues were not fully considered in the High Court.

3. The appellant is the father. The first-named respondent is the mother of the child; the second-named respondent is her female partner. I will refer to the appellant as the father. I will refer to the respondents as P.L. and B.M. or together as the respondents. On occasion, I refer to P.L. as "the mother."

4. By judgment of 16th April 2008, Hedigan J. after a hearing lasting fourteen days in the High Court refused the father's claims for guardianship and/or access to the child.

The Facts

5. The evidence given in the High Court covered at great length and huge detail the entire history of the relationship between the parties, especially the arrangements they entered into for the provision by the father of his sperm, the ensuing events leading up to the birth of the child and then the later emergence of disagreements, conflict and complete rupture of relationships. Hedigan J. resolved disputed issues of fact, mostly in favour of the respondents. While the father contests a number of the findings, the broad outline of the facts is clear enough. I do not think it is relevant to trace in detail the history of the relationship between the father on the one hand and the respondents on the other hand. The legal issues in the case do not depend on who was right or wrong on each issue.

6. The father is a single gay man, aged 41 years. While he lived for some years in the United States, he has lived in Ireland for some ten years and has worked in the area of design.

7. P.L. is of Australian nationality. She is 42 years of age. She is qualified as an occupational therapist. B.M. is Irish, aged 53; she is a psychiatrist.

8. P.L. and B.M. met in London in the mid-1990s. They entered into a lesbian relationship and have lived together as a same-sex couple in a stable relationship since about 1996. They moved to live in Dublin about 2003, but travelled to London to enter into a form of Civil Union under English law at a ceremony in London on 27th January 2006.

9. The respondents saw themselves as a couple in a permanent relationship and wished to have a child. Their intention at all times was that the child would be part of a family in which they would be the sole parents. On the other hand, they did not wish to use an anonymous sperm donor. The donor would be known and his identity would (ultimately) be disclosed to the child. He would not have any parenting role. His role would be that of "favourite uncle." He would have contact with the child only at their discretion.

10. The respondents informed themselves about artificial insemination by sperm donation. P.L. was to be the mother. They discussed their wishes with friends and approached a number of males, including a friend living in Amsterdam. They entered into a written agreement with him. Attempts by P.L. to conceive from the sperm of this friend over the years from 2003 to 2005 were unsuccessful.

11. The respondents first met the father very briefly at a party in Dublin in December 2004. The possibility of his becoming a sperm donor was raised but not very seriously.

12. After Christmas the father met the respondents. They had more significant discussions. They gave him a copy of a book about Lesbian Parenting. There was a dispute about whether they also gave him what was described as a draft of the agreement he would be asked to sign. In fact, this was a copy of the agreement they had made with the Amsterdam friend. The respondents said that they had given him this in January. The father said that they had not or did not remember. The learned trial judge found in favour of the respondents.

13. There was some controversy about whether the father read the book about Lesbian Parenting. The learned trial judge criticised him for not reading it sufficiently, in particular those parts which dealt with the relationship between the sperm donor and the child. The father's evidence was that he did not like aspects of the book, especially those parts which suggested that the donor would not have any role. He accepted that he had not read the book through. The father blew hot and cold about the whole project during the early months of 2005. His uncertainty was undoubtedly related to the crux of what became the dispute between the parties, namely the extent to which he, as donor, would have any involvement with any child that would be born. He told the respondents about March that he would not go ahead. It has to be said that the respondents were always very clear about the matter. They alone would form a family unit with the child, who would have two female parents. The donor would not be anonymous, but neither would he play the normal role of father. He would have no parenting role.

14. There was occasional contact between the parties in the early months of 2005. The father had some health tests done and informed the respondents of the results.

15. In July 2005, the father approached the respondents again. On 9th August, 2005, he met them at their home. The agreement (the first draft so far as the father was concerned, the second according to the respondents) was printed from P.L.'s computer. It was not signed at that stage. It was amended to insert the father's name and to substitute the word "friend" for "long term friend."

16. The father provided sperm samples on 9th, 10th and 11th August. P.L. inseminated herself. At the end of August the father visited P.L. She informed him that she was pregnant.

17. The draft agreement was amended at the father's suggestion by the inclusion, at the end, of a provision relating to the eventuality of the death of the respondents.

18. The agreement was, substituting the designations the father, P.L. and B.M., for their actual names as follows:

> "Agreement on Sperm Donation by the father to P.L. and B.M.
> P.L. and B.M. have lived together as a couple for over 7 years and decided that they would like to have a child. The father is a friend and has agreed to act as a sperm donor. This arrangement was agreed upon in preference to an anonymous sperm donation (as it would be in the interest of a child to have knowledge of their biological father).
> The child will know that the father is his/her biological father. The child will be encouraged to call him [name given]
> Birth Certificate:
> The father doesn't mind if his name is included or not on the birth certificate, and is agreeable to whatever P.L. and B.M. decide upon this matter.
> Parental Role:

A agrees that the child's parents are P.L. and B.M. The father would like to have some contact with the child but will be under no obligation to do so. He sees his role as being like a 'favourite uncle'. He will not have any responsibility for the child's upbringing and will not seek to influence the child's upbringing.

Contact Arrangements:

The father will be welcome to visit P.L., B.M. and their child at mutually convenient times. This will be at the discretion of P.L. and B.M. The father wants to make sure that the child will establish a solid relationship with P.L. and B.M., as parents and will not want to interfere with this in any way.

Financial obligations:

P.L. and B.M. will be fully responsible for the child's upbringing and B.M. will have no financial obligations to the child.

Child's contact with the father's extended family:

The child's extended family will be the extended families of P.L. and B.M. Contact with the father's extended family will be at the discretion of P.L. and B.M.

In the event that P.L. and B.M. should pass away, the father's contact with the child should continue uninterrupted as per his history of involvement. Also the father's opinion should be considered in terms of deciding the best guardianship arrangements for the child.

This agreement was drawn up at [address]"

19. The agreement in that amended form was signed by the father, P.L. and B.M. on 11th September, 2005.

20. The agreement purported to lay down rules governing in advance the relationship between the child and the father, on the one hand, and the respondents on the other. It is drafted to give effect to the respondents' intentions and understanding of the entire set of relationships. P.L. and B.M. are to be the parents, "fully responsible for the child's upbringing." The father, at most, is to be a "favourite uncle." While he would like to have "some contact" he has no obligations in that regard and any visits are to be in the discretion of P.L. and B.M. Perhaps the most explicit provision for the father is that: "He will not have any responsibility for the child's upbringing and will not seek to influence the child's upbringing."

21. None of this is to say that the agreement is legally binding. That needs to be considered at the level of legal principle, taking account especially of the interests of the child.

22. It emerged over the following periods covering the time before the birth of the child, but especially afterwards that the respondents had a very different and restrictive view of the extent to which the father could involve himself in their lives and the life of the child.

23. Relations remained comparatively amicable during the mother's pregnancy. Even then, there was an occasion when the mother was unhappy that the father permitted a visiting American friend of his to refer to the prospect that the expected child would be fortunate in having three parents. The mother complained that the father should have corrected this misperception.

24. After the birth, matters deteriorated almost from the beginning. It seems clear that the father acted insensitively. He brought a video camera to the residence and filmed the child. He involved members of his own family, whom he brought to visit. He initiated visits, even when the mother was suffering from the after effects of childbirth. The father complained sharply (though he later apologised) when the mother declined to meet himself and his sister who had driven up from Wicklow. He visited every week up to the end of July. The respondents went on holiday to Kerry in August and reviewed and discussed the entire relationship. The learned trial judge described the situation, as it developed, in the following terms:

> *"They considered the father. was being intrusive. He kept inviting himself, albeit politely. Before he would leave he would make an arrangement for the next time. This then meant they had to keep that time free. Before the birth they had only met once a month. After that there was pressure to be meeting weekly. They concluded that the father had stepped over the line as it were, that he was no longer behaving as an uncle and was intruding in their family life."*

25. The respondents decided to confront the father. They deliberately arranged to meet him at a hotel rather than at their home. They met at the Marine Hotel in Sutton in September, 2006. The respondents told the father that he had overstepped the boundaries as they saw them, that they had no interest in continuing a relationship with his family and that it would be better if he did not have any more contact. They were concerned that he was portraying himself as a father, rather than staying in the role of uncle as agreed.

26. The parties met about a month later at Farmleigh House. The father was allowed to hold the child for a short time. He suggested meeting on the first Sunday of every month. They disagreed: that was too much. At a later meeting at a hotel, the father was told to "back off." He was not wanted. There was no contact after November 2007.

27. After the birth of the child the two sides had very different approaches and understandings. In the context of the agreement that had been made, the father's participation as a sperm donor and the relationship between the respondents, the father was motivated by his biological parenthood, while the mother and B.M. saw themselves as a family unit with the child, excluding the father.

28. The father had, of course, accepted that, as a "favourite uncle" at best, he would have no parenting role and that he would have no say in and would not seek to influence the child's upbringing. He accepted, as he had to, that he was now seeking to have a say, including a role as guardian. He had clearly come round to the view that he should be recognised as the father.

29. The respondents regarded it as crucial that they be accepted as a fully autonomous family unit, free from any outside interference; it was crucial that they be seen as the only parents of the child. The child had two parents: the mother and B.M., although, of course, B.M. had played no biological role in his birth.

30. Not surprisingly, there was a complete breakdown of mutual trust. To a large extent, this has to be laid at the door of the father. He frankly accepted that he had changed his position as it had been at the time of the agreement. The learned trial judge criticised the father severely on this ground.

31. At one point, the learned trial judge went so far as to find that the father had deceived the respondents as to his true intentions in entering into the sperm-donation agreement. In reaching this conclusion, he disagreed with the opinion of Dr. Gerard Byrne, as expressed in his report. The father challenges this finding on this appeal. I have been unable to find, in my reading of the transcripts, any point at which this was put to the father, namely the accusation that that he had deceived the respondents. It is true that P.L., at one point in the course of a long answer, spoke about being "tricked or deceived," but without saying in what respect. Dr. Byrne dealt with the respondents' complaints in his report. I do not think, therefore, that there was evidence before the learned trial judge to support his finding that the father had deceived the respondents as to his intentions at the time he entered into the agreement. I do not think it is fair or just to make a finding of dishonesty, without its having, at least been put to the person accused. This finding might not be of particular importance standing on its own. However, the learned trial judge, in the course of the hearing interpreted a crucially important aspect of Dr. Byrne's evidence, namely that there was no rational basis for the mother's feeling of being violated by the father (discussed later) as being based on a belief that the father had deliberately misled her. Thus, his own conclusion that the father had in fact deliberately misled her and had "used her as a surrogate mother" meant that, in the view of the learned judge, as distinct from that of Dr. Byrne, the mother had a rational basis for feeling violated by the father.

32. Nonetheless, the fact remains that the father, as the learned trial judge correctly found, and as he himself accepted, departed from the understanding agreed with the respondents. He was not prepared to respect the respondents' wish to exercise total autonomy as a family with the child. He wishes and seeks in these proceedings to exercise parental rights as guardian of and to have access to the child.

33. The real issue is, of course, whether the father should be appointed as guardian or be permitted any access to or contact with the child. Normally the conflicts between the father and the respondents should not have any great bearing on the determination of that question.

Evidence of Child's Welfare

34. On 30th March, 2007, Abbot J. made an order appointing Dr. Gerard Byrne as assessor for the purpose of preparing a report pursuant to section 47 of the Family Law Act, 1995. Dr. Byrne is a child psychiatrist of national and international standing. He prepared a comprehensive report pursuant to section 47 and gave evidence in the High Court.

35. Dr. Byrne interviewed all parties, including the child. He believes that a child should normally have knowledge, as part of the formation of his or her identity, of both parents, in the absence compelling reasons to the contrary. Access should be such as to allow a

meaningful relationship to develop. This is clearly an important opinion and seems to be the starting point for consideration of the welfare of the child.

36. Dr. Byrne believes, on the other hand, that the child has no relationship with the father other than a biological one. Upon the arranged meeting the child did not recognise the father, nor did he exhibit any attachment behaviour. This does not surprise Dr. Byrne because the father has not been with the child since his birth for any appreciable length of time and has never been in a caretaking relationship.

37. Dr. Byrne, on the other hand, expressed interesting views regarding the father's situation. His advice would be that a sperm donor should act anonymously without having any contact. If there is contact, once a father sees a baby, it would be "beyond reasonableness," and "beyond what a man in that circumstance would be capable of" for him not to wish to be involved.

38. Dr. Byrne does not favour access by A at this stage in the child's development. He would postpone first contact until approximately the age of six and then based on introduction by the mother and B.M. At this stage it would be very difficult to introduce him to an effective stranger. It would be a struggle for everyone and might not last. Dr. Byrne attaches particular importance to the mother's attitude to the father. There was never anything approximating to a family type situation involving the father. The mother feels "violated" by the father: he had invaded her integrity. This is a very powerful emotion. It goes beyond being angry.

39. The child's primary attachment is to the mother. It is important for the child's upbringing that this be maintained and optimised. The mother perceives the father as representing a threat to her relationship with the child. It also poses a threat to the perception by /the mother. and B.M. of themselves as constituting a family unit with the child. Dr. Byrne's conclusion is that any access arranged for the father would engender tensions in the relationship between the mother and B.M., which would be bound to communicate itself to and be damaging to the child. Children will pick up the psychological climate. He does not believe the mother and B.M. could ever cooperate with the child in a manner which would not be damaging to the child.

40. Dr. Byrne took particular note of the mother's belief that the father was deceitful and calculating in making the sperm donation, but says that he is not convinced that he was deceitful; rather he believes that he had not really thought the matter through. Dr. Byrne is of opinion that the father should not have any role in the child's life "that gives him rights that could interfere with the child's family life" with the respondents.

41. Dr. Antoinette Dalton, a specialist in child and adolescent psychiatry was called as a witness on behalf of the father. Dr. Dalton had interviewed the father, but was severely disadvantaged by the fact that she had not met the mother or B.M. Nor had she seen the child. She said that it was an unusual circumstance to feel violated without a reason. It was at this point in her evidence that the learned judge intervened to point out that this view of Dr. Byrne had been based on the assumption that the father had not deliberately

misled the mother and referred to her feeling like a surrogate mother. Dr. Dalton pointed out that there was no question of that: the mother had had the child and there had been no question of his being taken away from her.

42. The key point of disagreement between Dr. Dalton and Dr. Byrne was that Dr. Dalton had difficulty in accepting his view that the introduction of the father to the child should be postponed to the age of six. It did not make sense to deprive the father and the child of each other's society for four and a half years. She thought that these were the formative years, a very intense time, when the child develops physically and mentally and develops skills. They are important years for the child and for the relationship and that it would be dangers in introducing a significant adult when the child had passed toddlerhood. She thought the father should see the child two to three times a week to build a relationship.

43. On the other hand, Dr. Dalton expressed concern as to the possible loss of trust by the child, as a more mature child, a teenager, if the mother and B.M. were to keep from him the true facts of his parentage.

44. Dr. Byrne and Dr. Dalton were in agreement that there is general acceptance that children are not at a significant disadvantage from being brought up by a same-sex couple. They also agreed that the father is a caring, responsible person, who has the best interests of the child at heart. These remarks should not, of course, be regarded as conclusive on the issue of children being brought up by same-sex partners. The learned trial judge acknowledged the *"psychological challenge growing up with same sex parents."*

Interlocutory Proceedings

45. The dispute between the parties came to a head in early 2007, when the respondents wished to go to Australia. It was then that the father consulted Dr. Antoinette Dalton.

46. On 22nd March, 2007, the father issued the Plenary Summons which commenced the present proceedings. The principal relief sought is:

- appointment of the father as guardian of the child pursuant to s. 11 of the Guardianship of Infants Act, 1964;
- an order pursuant to the same section giving him joint custody;
- an order regulating the father's access to the child.

47. On 22nd March, 2008, the father applied *ex parte* to the High Court for an order restraining the respondents from removing the child from the jurisdiction. This was based on an understanding that the mother had obtained a residency permit permitting her to go to Australia and a belief that the child was about to be taken to Australia. In fact, it emerged that they wished to go for a year so that B.M. could take up a temporary senior staff position as a psychiatrist.

48. On 22nd March, 2008, Abbot J. granted an interim injunction restraining the respondents from removing the child from the jurisdiction. On the following day, the learned judge vacated that order and made an order:

- granting liberty to the respondents to take the child for a vacation in Australia from 25th March to 9th May 2007;
- on the child's return to the jurisdiction, that the respondents be restrained from further removing the child from the jurisdiction pending the hearing of the action.

49. The respondents appealed the order of Abbot J. of 23rd March, 2007, to this Court. On 19th July, 2007, this Court dismissed the appeal. Denham J. delivering the judgment of the majority of the Court emphasised that *"the critical factor in the balancing required of the Court……is the welfare of the infant."* She stressed that the fact that the decision had been made on the basis of the balance of convenience meant that *"it should not be inferred as presuming rights for the applicant."*

High Court Judgment

50. The principal features of the careful and comprehensive judgment of the learned trial judge are as follows:

> 1. While the agreement might constitute a valid contract, it is enforceable only to the extent that the rights or welfare of the child are not prejudiced;
> 2. The mother of the child enjoys a personal constitutional right to the custody of the child: the court should presume that the mother will act in the child's best interests;
> 3. The father, as sperm donor, has a mere right to seek appointment as guardian; he has no right, even a defeasible one, to be so appointed; in order to establish the extent of the father's rights, the court should look for factors other than the blood link, which is of little weight; at all times the welfare of the child is paramount.
> 4. While there cannot be discrimination against a non-marital child by denial of access to his father, the child's welfare is the first and paramount consideration;
> 5. The mother , B.M. and the child constitute a *de facto* family, enjoying rights as such under Article 8 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter "the Convention), which are cognisable in Irish law; the learned trial judge relied on the decision of the European Court in *X, Y and Z v. U.K.* [1997] 24 E.H.R.R. 143, as demonstrating a *"substantial movement"* towards a finding that a same-sex couple could constitute a family;
> 6. Because the mother, B.M. and the child enjoy rights as a *de facto* family, this is a factor which must come into play in determining the central question, namely whether the father should be granted guardianship rights such as would ensure he had access to the child;
> 7. In considering the application of the father for guardianship and access to the child, the welfare of the child was the first and paramount consideration.
>
> > *a. In giving effect to that consideration, the court should give considerable weight to the report prepared by Dr. Gerard Byrne, as a court-appointed expert, pursuant to s. 47 of the Family Law Act, 1995 and should depart from it only for* "grave reasons which should be clearly set out." *The expert nominated by the court should, save in certain exceptional circumstances, be preferred to that of an expert witness called by one party;*

b. *While* , "in general it is beneficial for a child to have access to both its natural parents, there may be circumstances where this is not so;" *Dr. Byrne considers such circumstances to exist here;*

c. *The respondents feel huge distress at what they perceive to be the father's betrayal; they feel this to be destructive to* "their integrity as a family;" *this* "feeling of violation…… is a very important and fundamental matter";

d. *Dr. Byrne believes that the parties could not co-operate in such a way as would avoid exposing the child to conflict; conflict between adults causes psychological damage to a child;*

e. *While Dr. Byrne did not agree with the mother and B.M. that the father had deceived the respondents as to his true intentions at the time he entered into the sperm-donation agreement, the learned trial judge found that he had; thus, the respondents had substantial grounds for their feelings of betrayal and violation;*

f. *The learned trial judge considered that Dr. Dalton's evidence dealt superficially with the central point of Dr. Byrne's thesis, as summarised at paragraphs b, c and d above: he described her approach as being that the parties should just "get on with it." He thought she had failed to* "engage with the real problem which is whether the "getting-on-with-it" in such circumstances is actually possible without causing more harm than good;"

g. *It seems important to quote in full the passage which led the learned trial judge to conclude that the* child's "welfare would be best served by his continuing in the care, custody and guardianship of his family composed of P.L. and B.M. and that there should be no court ordered access to the applicant…" *He reasoned as follows:*

> *"The child currently lives in a loving, secure de facto family. There is no dispute but that the respondents are excellent parents to this child and the psychological evidence before the Court is that whilst he will encounter some problems growing up as the child of a same sex couple, he should suffer no gender confusion as a result thereof. As things stand, the child's future seems secure in a well ordered, loving and supportive family environment. Set against that is the probability of a future within a conflicted, dysfunctional and highly unpredictable relationship that would include, by court order, the presence either through guardianship, access or both of the applicants. Were the Court to order the latter, I have no doubt the parties would do their best to implement the order. What, however, would be the cost to the child? It seems to me the cost is likely to be the loss of a tranquil and calm upbringing. I further note the evidence of the respondents which I believe to be entirely genuine that their wish is that the child should know the identity*

of his biological father – that after all was the whole point of this agreement – and that he should have contact at an age appropriate time. I must further note Dr. Byrne's doubts as to whether the applicant would remain involved."

The Appeal

51. The father's objectives in the appeal are to obtain an order appointing him as guardian, jointly with the mother, of B.M. and orders granting him access to the child.

52. Ms. Inge Clissman, Senior Counsel, presented the appeal on behalf of the father. She said that the father is asking to be appointed guardian, pursuant to s. 6A of the Guardianship of Infants Act 1964 (as inserted by s. 12 of the Status of Children Act 1987), and to have access to the child, but not custody. These are rights of a parental nature. He seeks the benefit of the company of his child and for his child to have his company as he grows up. This is in the interests of the child. She acknowledged that these reliefs go beyond the "favourite uncle" role envisaged by the agreement. However, he had always thought that the agreement would permit him some involvement with the child. He had had no legal advice; the agreement was prepared by the respondents, based on the document used in connection with the friend living in Amsterdam. The father could not have foretold what his reaction would be upon the birth of the child. Ms. Clissman drew attention especially to the fact that the learned trial judge had dealt with the respondents as constituting a *de facto* family unit. This has no standing in Irish law. She said that the judge had accorded unprecedented weight to Dr. Byrne's s. 47 report.

53. Ms. Mary O'Toole, Senior Counsel, on behalf of the respondents, submitted that the learned trial judge had based his decision on the best interests of the child. Regarding his treatment of the s. 47 report, she said it was a matter of the weight to be accorded to the evidence. The learned trial judge had carefully examined the evidence of the two psychiatrists and had found Dr. Byrne to be more persuasive.

54. The Attorney General has made written submissions in respect of: a) the interpretation and application of the Convention; b) the status of the agreement on sperm donation; c) the weight accorded by the learned trial judge to the s. 47 report. It is only fair to point out that the learned trial judge did not have the benefit, as this Court has, of these important submissions.

55. The first—and, it seems to me—fundamental point made by the Attorney General is that the extended discussion of the Convention in the judgment of the High Court was not self-evidently necessary for, or connected to, the resolution of the case. The Attorney General cites a statement of McKechnie J. in his judgment in *T. v. O* [2007] I.E.H.C. 326 to the effect that, after the coming into force of the European Convention on Human Rights Act 2003, the High Court should *"apply the provisions of the Convention in the interpretation and application of any statutory provision or rule of law in so far as it is possible to do so in accordance with the established canons of construction and interpretation."* However, the High Court judgment does not identify any statutory provision or rule or law calling for interpretation in the light of the Convention. Furthermore, the Attorney General

remarks that it is far from clear how the issue of the claimed threat to the respondents' *de facto* family could arise. If the Court were to conclude that access by a biological father was in the best interests of the child, then such conclusion could not be overridden on the grounds that there was a non-marital heterosexual family in existence. It is not apparent therefore how the outcome of the case would be affected by a consideration of the status under Article 8 of a homosexual couple. The Attorney General also examines the High Court judgment at length and submits that the learned trial judge was, in any event in error both in his approach and in his actual interpretation of Article 8. The learned trial judge acknowledged that he was not aware of any case to date in which the European Court of Human Rights had found that a lesbian couple living together enjoyed the status of a *de facto* family. Accordingly, it was not open to the learned judge to reach the conclusion which he did, since the domestic courts do not have the primary function of interpreting the Convention.

56. The Attorney General submits that the agreement is unenforceable insofar as it puts in place an arrangement which is not in the best interests of the child.

57. Insofar as the s. 47 report is concerned, the Attorney General submits that despite the appointment of a court-appointed expert, the court must always exercise its independent judgment. It may be appropriate to attach greater weight to such a report than to a report commissioned by one of the parties where there may be some risk of partisanship. However, the judge must retain his own independence of judgment and he appears in this respect to have unduly restricted his own function.

The Issues

58. The novelty of the case has led the parties to explore questions of law and fact over a vast area. Some basic points are not, however, and could not be in dispute. First among these is that the welfare of the child must at every point be the overwhelming and governing consideration.

59. The following points need to be addressed:

1. The legal status of the agreement;
2. The rights of P.L., as the mother of the child;
3. The rights of the father as his biological father;
4. The legal status of the mother and B.M. as a "*de facto*" family, by virtue of the Convention;
5. The judge's treatment of the evidence regarding the welfare or best interests of the child, in two key respects:

    a. The status of Dr. Byrne's report pursuant to section 47 of the Family Law Act, 1995;

    b. The judge's consequent and crucial findings of fact and evaluation of the psychiatric evidence regarding the best interests of the child.

60. The first two issues present no real difficulties. Ultimately, the crucial questions relate to the extent to which the father should, if at all, have access to or contact with the child, all

parties accepting that the child's welfare must be decisive. Section 3 of the Guardianship of Infants Act, 1964 expresses in statutory form a universal human value that nobody could contest, namely that:

> *"Where in any proceedings before any court the custody, guardianship or upbringing of an infant……, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration."*

61. No party questions that principle in the present case. Disagreements arise because parties view the child's welfare from their own perspective. In such cases the courts decide.

The Agreement

62. The learned trial judge did not rule on the contractual status of the agreement. In reality, it was not necessary for him to do so. If such an agreement is to be regarded as enforceable at all, he held, rightly, in my view, that the agreement is enforceable only to the extent that the child's welfare is protected. The only material parts of the agreement relate either directly or indirectly to the question of the father's contact with the child, in which case the welfare principle takes over and renders the agreement redundant. The agreement purports to restrict and potentially to exclude access by the father to the child, that is to say the child's contact with or society with his biological father. It seeks to control the development of any relationship between the child and his father by making it absolutely dependant on the discretion of the mother and B.M. It may, indeed, be right to control or restrict that relationship. That cannot, however, be dictated by an agreement made before birth between his two biological parents together with a third person who has no biological link. As a matter of law, the relationship between the father and the child must be dictated by the best interests of the latter.

63. In this case the aspect of the welfare of the child which is in issue is his relationships with his natural or biological parents and with the respondents insofar as it is claimed that they constitute a *de facto* family. The relationship between the child and P.L., his mother, and her right to custody is undisputed.

Constitutional Right of the Mother

64. Our law ascribes particular importance to the unique role and consequent unique natural right of the mother of a child. The learned trial judge cited a well-known passage from the judgment of O'Higgins C.J. in *G. v. An Bord Uchtála* [1980] I.R. 32 at 55:

> *"But the plaintiff is a mother and, as such, she has rights which derive from the fact of motherhood and from nature itself. These rights are among her personal rights as a human being and they are rights which, under Article 40, s.3, sub-s.1,[of the Constitution] the State is bound to respect, defend and vindicate. As a mother, she has the right to protect and care for, and to have the custody of, her infant child. …… This right is clearly based on the natural relationship which exists between a mother and child. In my view, it arises from the infant's total dependency and helplessness and from the mother's natural determination to protect and sustain her child".*

65. The right here recognised is a personal right protected by Article 40 s. 3 of the Constitution. Articles 41 and 42 apply only to families founded on marriage. Section 6(4) of the Act of 1964 provides statutory support for the constitutional position of the mother: *"The mother of an illegitimate infant shall be guardian of the infant."* The father has consistently accepted and does not in these proceedings dispute the right of the mother to guardianship and custody of the child. He does not question her fitness as a mother or the quality of her care for the child in any respect whatever.

Position of the Natural Father

66. The third issue raises in an unprecedented form the extent, if any, of the rights or interests of a natural father to be appointed as guardian or to be permitted access. Section 6A of the Guardianship of Infants Act 1964 (as inserted by s. 12 of the Status of Children Act 1987) provides:

> *"(1) Where the father and mother have not married each other, the court may, on the application of the father, by order appoint him to be a guardian of the infant".*

67. In addition, s. 11(4) of the Act of 1964, as amended by s. 13 of the Act of 1987 provides:

> *"In the case of an infant whose father and mother have not married each other, the right to make an application under this section regarding the custody of the infant and the right of access thereto of his father or mother shall extend to the father who is not a guardian of the infant, and for this purpose references in this section to the father or parent of an infant shall he construed as including him."*

This Court has considered the rights or interests of a natural father in two leading cases.

68. In *J.K. and V. W.* [1990] 2 I.R. 437 at 446, Finlay C.J., with whom Walsh, Griffin and Hederman J.J. agreed, disapproved in clear terms the test which had been propounded by Barron J. in the High Court in that case, namely that, if the natural father was fit to be appointed a guardian, then the question was *"whether there are circumstances involving the welfare of the child which require that, notwithstanding that he is a fit person, he should not be so appointed."* This Court held that Barron J. had misinterpreted s. 6A of the Act of 1964, quoted above, on the rights of the natural father.

69. The statements of Finlay C.J. on the relationship generally between the status of the natural father and the welfare of his child are authoritative and constitute a binding statement of the law for the instant case. He said at page 446 of the report:

> *"Section 6A gives a right to the natural father to apply to be appointed guardian. It does not give him a right to be guardian, and it does not equate his position vis-à-vis the infant as a matter of law with the position of a father who is married to the mother of the infant. In the latter instance the father is the guardian of the infant and must remain so, although certain of the powers and rights of a guardian may, in the interests of the welfare of the infant, be taken from him."*

70. The natural father thus had *"a right to apply pursuant to a statute which specifically provides that the court in deciding upon such application shall regard the welfare of the infant as the first and paramount consideration."*

71. The Chief Justice directly addressed the test proposed by Barron J. in the following trenchant terms:

> *"A right to guardianship defeasible by circumstances or reasons "involving the welfare of the child" could not possibly be equated with regarding the welfare of the child as the first and paramount consideration in the exercise by the court of its discretion as to whether or not to appoint the father guardian. The construction apparently placed by the learned trial judge in the case stated upon s. 6A to a large extent would appear to spring from the submission made on behalf of the applicant on this appeal that he has got a constitutional right, or a natural right identified by the Constitution, to the guardianship of the child, and that the Act of 1987 by inserting s. 6A into the Act of 1964 is thereby declaring or acknowledging that right.*
>
> *"I am satisfied that this submission is not correct and that although there may be rights of interest or concern arising from the blood link between the father and the child, no constitutional right to guardianship in the father of the child exists. This conclusion does not, of course, in any way infringe on such considerations appropriate to the welfare of the child in different circumstances as may make it desirable for the child to enjoy the society, protection and guardianship of its father, even though its father and mother are not married."*

72. The Chief Justice observed, at page 447 that:

> *"The range of variation would, I am satisfied, extend from the situation of the father of a child conceived as the result of a casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as the result of a stable and established relationship and nurtured at the commencement of his life by his father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed."*

73. He concluded:

> *"I am satisfied that the correct construction of s. 6A is that it gives to the natural father a right to apply to the court to be appointed as guardian, as distinct from even a defeasible right to be a guardian. The discretion vested in the Court on the making of such an application must be exercised regarding the welfare of the infant as the first and paramount consideration.*

"The blood link between the infant and the father and the possibility for the infant to have the benefit of the guardianship by and the society of its father is one of many factors which may be viewed by the court as relevant to its welfare".

74. The theme of the "blood link" was taken up by Hamilton C.J. in *W.O'R. v. E.H*. [1996] 2 I.R. 248 at 269:

"The rights of interest or concern in the context of the guardianship application arise on the making of the application. However, the basic issue for the trial judge is the welfare of the children. In so determining, consideration must be given to all relevant factors. The blood link between the natural father and the children will be one of the many factors for the judge to consider, and the weight it will be given will depend on the circumstances as a whole. Thus, the link, if it is only a blood link in the absence of other factors beneficial to the children, and in the presence of factors negative to the children's welfare, is of small weight and would not be a determining factor. But where the children are born as a result of a stable and established relationship and nurtured at the commencement of life by father and mother in a de facto family as opposed to a constitutional family, then the natural father, on application to the Court under s. 6A of the Guardianship of Infants Act, 1964, has extensive rights of interest and concern. However, they are subordinate to the paramount concern of the court which is the welfare of the children".

75. Denham J. in her judgment in the same case, at page 273, spoke of the weight to be given to the blood link in identical terms.

76. The legal position as it emerges from these cases is that the natural or non-marital father:

1. has no constitutional right to the guardianship or custody of or access to a child of which he is the natural father;
2. has a statutory right to apply for guardianship or other orders relating to a child; this entails only a right to have his application considered;
3. the strength of the father's case, which is described in the three judgments from which I have quoted as consisting of "rights of interests or concern," will depend on an assessment of the entirety of the circumstances, of which the blood link is one element, whose importance will also vary with the circumstances; in some situations it will be of *"small weight;"*
4. both Hamilton C.J. and Denham J. spoke of *de facto* families in the context of an application for guardianship pursuant to the Act of 1964 and only in the sense of a natural father living with his child and unmarried partner in an ostensible family unit; a *de facto* family does not exist in law independent of the statutory context of an application for guardianship;
5. The father's rights, i.e., right to apply, if any, are in all cases subordinate to the best interests of the child.

77. The notion of “rights of interest or concern” has not been further analysed. In its context, it is an expression designed to lay emphasis on the interests of the child and not to confer any distinct rights on the father.

78. The blood link is an unavoidable biological fact. Equally, it exists outside marriage in situations as diverse as human life itself. In our changing society, many children are born into apparently normal and stable family situations, though the parents have never married. At the other extreme, a child may be the fruit of an act of casual lust or commerce or, worse, an act of violence. Advances in science have made it possible for conception and birth to take place even without any act of human intercourse. It is both right and natural to have particular regard to the context of conception, birth and subsequent family links.

79. Although it is not suggested, in the present case, that the father is any less the biological father of the child by reason of being a sperm donor, he has, as a non-marital father, no constitutional right to guardianship or custody. The principle is that he has the legal right to apply and to have his application considered. To the extent that Finlay C.J. and Denham J. postulated a scale for assessment of “rights of interests or concern,” it seems likely that the sperm donor would be placed quite low, certainly by comparison with the natural father in a long-term relationship approximating to a family.

80. The particular context of a sperm donor has not previously come before our courts, though we were referred to a Scottish case where a Sheriff held a sperm donor to have parental rights. Murphy J. referred to the matter in his judgment in *W.O'R. v. E.H.*, cited above, at page 286, as support for the argument against recognition of the mere fact of fatherhood as conferring constitutional rights. In my view, the matter must be viewed only by reference to the interests of the child.

81. The blood link, as a matter of almost universal experience, exerts a powerful influence on people. The father, in the present case, stands as proof that participation in the limited role of sperm donor under the terms of a restrictive agreement does not prevent the development of unforeseen but powerful paternal instincts. Dr. Byrne acknowledged that it would be “beyond what a man in that circumstance would be capable of” for him not to wish to be involved. More importantly, from the point of view of the child, the psychiatrists were in agreement that a child should normally have knowledge, as part of the formation of his or her identity, of both parents, in the absence compelling reasons to the contrary. There is natural human curiosity about parentage. Scientific advances have made us aware that our unique genetic make-up derives from two independent but equally unique sources of genetic material. That is the aspect of the welfare of the child which arises.

P.L., B.M. and the Child as a *De facto* Family: the Convention

Status of the Convention in Irish law

82. I move then to consider whether the mother and B.M. should be considered to constitute, together with the child, a *de facto* family, recognised as such in Irish law by virtue of the

Convention, as was found by the learned trial judge. He referred to this matter at several points in his judgment, most clearly as follows:

> *"Thus, this de facto family has such family rights as may arise under article 8 which do not conflict with Irish law. Where any conflict exists, Irish law must prevail and the Court would be limited to the making of a declaration of incompatibility under s. 5 of the European Convention on Human Rights Act 2003.*
>
> *"I can find nothing in Irish law to suggest this family composed of two women and a child has any lesser right to be recognised as a de facto family than a family composed of a man and a woman unmarried to each other and a child. Indeed, it seems to me that the State has a strong interest in the recognition, maintenance and protection of all de facto families that exist since they are inherently supportive units albeit unrecognised by the Constitution."*

83. The constitutional position was addressed in the case of W.O'R. v. E.H., cited above. Following the decision of this Court in J.K. and V. W., also cited above, the Irish legal provisions were challenged in the European Court of Human Rights. In *Keegan v Ireland* [1994] 18 EHRR 342, that court held that Article 8 of the Convention was not confined to a family based on marriage. The placing for adoption of the child of an unmarried father without his consent amounted to an interference with his family life. This Court ruled in W.O'R. v. E.H, in a passage cited by the learned trial judge, that Keegan was not part of the domestic law of Ireland. Specifically, it held;

> *"The family referred to in Article 41 and 42 of the Constitution is the family based on marriage. The concept of a 'de facto' family is unknown to the Irish Constitution."*

84. Parental rights, other than those derived from the Constitution, are governed by statute. Any consideration of the Convention in Irish law requires reference to be made to Article 29, section 6 of the Constitution, which provides that

> *"No international shall be part of the domestic law of the State save as may be provided by the Oireachtas."*

85. The task of implementing the decision of the European Court of Human Rights in Irish law lay with the Oireachtas. It took the form of the Adoption Act, 1998. (see explanation in Shannon, *Child Law*, (Thomson Round Hall 2005) pages 302 to 304).

86. The learned trial judge does not appear to have addressed this constitutional problem. He observes that *"Irish law is silent on the question of homosexual de facto families…"* He then refers to the provisions of the European Convention on Human Rights Act, 2003 before observing that *"the primary source for interpretation and application of the E.C.H.R. is the domestic courts of the Member States."* He says that it is *"the domestic courts which have the primary obligation to interpret and apply the E.C.H.R."* Articles 1 and 13, he said, *"lay firmly and clearly upon the Irish courts the duty to secure a remedy*

where required and apply the rights contained in the Convention." He does not, however, explain the legal basis upon which, even accepting his interpretation of Article 8 of the Convention, the court is empowered to apply the notion, not recognised by the Constitution, of a *de facto* family in the law of the State. Throughout this part of his reasoning the learned judge implies that Convention provisions and principles impose obligations directly on the courts of the contracting states. That assumption seems particularly to underlie the passage which I have quoted at paragraph 86 above. The learned judge speaks of the possibility of a declaration of incompatibility pursuant to section 5, in the event of conflict with Irish law. In the absence of such a conflict, it seems that the *"de facto family has such family rights as may arise under article 8…"* This is to overlook the distinction between the international obligations of the State pursuant to the Convention and its effect in domestic law. Under the Constitution, only the Oireachtas has the power to give effect in *"the domestic law of the State"* to the terms of an international agreement.

87. By virtue of s. 2 of the Act of 2003, the courts, *when "interpreting and applying any statutory provision or rule of law,"* are obliged, *"in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."* The Attorney General submits that the High Court judgment does not identify any statutory provision or rule of law which required interpretation. As I have explained in the preceding paragraph, the learned judge refers at a number of points to the power of the courts, pursuant to s. 5 of the Act of 2003, to make an order declaring that a law is incompatible with a provision of the Convention. However, no law is at any point identified which might be so declared. While the lengthy and erudite written submissions of the respondents support the decision of the learned trial judge regarding the interpretation of Article 8, they do not at any point explain how that Article comes to be applied in Irish law.

88. The High Court judgment does not provide any basis by reference to the Act of 2003 or otherwise for the application in Irish law of the notion of *de facto* family based on Article 8 of the Convention. It seems that the learned trial judge effectively gave direct effect to the Convention. That is not permissible, having regard to Article 29 of The Constitution. The Convention does not have direct effect in Irish law. Thus, the learned trial judge was in error in his application of the notion of a *de facto* family (comprising P.L., B.M. and the child). For these reasons, the learned trial judge should not have considered Article 8 of the Convention. That should suffice to persuade the Court to allow the appeal.

Interpreting the Convention: ECtHR or Domestic Courts

89. The Attorney General, as notice party, challenges the High Court judgment on a distinct and alternative ground, to which I will now refer. This ground does not, strictly speaking, arise unless I am incorrect in holding the learned trial judge to have erred in giving direct effect, derived from Article 8 of the Convention, to the notion of a *de facto* family.

90. The learned judge acknowledged that he was unaware of any case to date *"in which the European Court of Human Rights has found that a lesbian couple living together in a committed relationship enjoy the status of a de facto family relationship to which article 8*

is applicable." The Attorney General points out that the learned judge did not refer to the decision of the European Court in *Mata Estevez v. Spain,* (Reports of Judgments and Decisions 2001-VI, p. 311, decision of 10th May, 2001), where the applicant, the survivor of a male homosexual couple, had complained of the difference in treatment regarding eligibility for a survivor's pension between *de facto* homosexual partners and married couples. In fact, the case does no appear to have been cited in the high Court. Dealing with the case by reference to Article 8, the European Court said:

> *"As regards establishing whether the decision in question concerns the sphere of "family life" within the meaning of Article 8 § 1 of the Convention, the Court reiterates that, according to the established case law of the Convention institutions, long-term homosexual relationships between two men do not fall within the scope of the right to respect for family life protected by Article 8 of the Convention... The Court considers that, despite the growing tendency in a number of European States towards the legal and judicial recognition of stable de facto partnerships between homosexuals, this is, given the existence of little common ground between the contracting States, an area in which they still enjoy a wide margin of appreciation… Accordingly the Applicant's relationship with his late partner does not fall within Article 8 insofar as that provision protects the right to respect for family life."*

91. The latter part of that passage undoubtedly leaves the door open for further development. In the case of *Karner v. Austria* [2004] 38 EHRR 24, cited by the respondents, the Court preferred to deal with a case brought by a homosexual as one of discrimination pursuant to Article 14 combined with Article 8. In doing so, the court abstained from ruling on questions of "private life" or "family life" because, it held, *"the applicant's complaint relates to the manner in which the alleged difference in treatment adversely affected the enjoyment of his right to respect for his home…"* Thus *Mata Estevez* remains undisturbed.

92. However, the learned trial judge cited *X, Y and Z v. U.K.* [1997] 24 E.H.R.R. 143, and decided, thus, before *Mata Estevez,* in support of the existence of *"substantial movement"* towards recognition of a lesbian couple live together in a long term committed relationship as constituting a *de facto* family enjoying rights as such under Article 8 of the E.C.H.R. That case concerned a female-to-male transsexual living with a woman who had given birth by artificial insemination. The court noted that that *X* was a transsexual who had undergone gender reassignment surgery. It continued:

> *"He has lived with Y, to all appearances as her male partner, since 1979. The couple applied jointly for, and were granted, treatment by AID to allow Y to have a child. X was involved throughout that process and has acted as Z's "father" in every respect since the birth…….. In these circumstances, the Court considers that de facto family ties link the three applicants."*

93. The court observed (see paragraph 43) that, up to that point, it had been *"been called upon to consider only family ties existing between biological parents and their offspring."* It analysed the *"complex scientific, legal, moral and social issues, in respect of which* [it

considered] *there is no generally shared approach among the Contracting States,"* but held that there had been no violation of Article 8.

94. The learned judge may well be right to expect that the European Court may in time recognise settled homosexual couples in stable relationships as constituting a family for the purposes of Article 8. For many reasons, the matter is by no means straightforward and I do not find it necessary to discuss it further in this judgment. The question is whether the learned trial judge was entitled, as a national judge, to anticipate such a development.

95. The form in which the matter arises on the appeal is whether, through the mechanism of the Act of 2003, an Irish court may anticipate further developments in the interpretation of the Convention by the European Court in a direction not yet taken by the Court.

96. Section 2 of the Act of 2003 is the material provision. It reads:

> *2.—(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.*
>
> *(2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter.*

97. To assist courts in that interpretative task, section 4 provides that judicial notice is to be given to a wide range of materials, including, of course, the Convention provisions, but, *inter alia,* also *"any declaration, decision, advisory opinion or judgment of the European Court of Human Rights…"* and that courts shall "take due account of the principles" they lay down.

98. Article 8 provides as follows:

Right to Respect for Private and Family Life

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

99. The Convention is an instrument of international law. It imposes obligations in international law on the contracting states. It does not require domestic incorporation of its terms into the law of the contracting states. Its judgments, as this court has repeatedly stated, do not have direct effect in our law. The contracting states are under

an obligation in international law to secure respect for the rights it declares within their domestic systems. The European Court has the primary task of interpreting the Convention. The national courts no not become Convention courts.

100. Lord Bingham correctly outlined the respective tasks of the European Court and the domestic courts in the following passage from his speech in *R. (Ullah) v. Special Adjudicator* [2004] 2 AC 323:

> *"In determining the present question, the House is required by Section 2(1) of the Human Rights Act, 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that Courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg Court… This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg Court. From this it follows that a national Court subject to a duty such as that imposed by Section 2 should not without strong reason, dilute or weaken the effect of the Strasbourg case law……It is of course open to Member States to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national Courts, since the meaning of the Convention should be uniform throughout the States party to it. The duty of national Courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less"."*

101. Lord Bingham was, of course, speaking of the English legislation which corresponds, though with some important differences, to provisions of our Act of 2003.

102. What the High Court judge has done goes beyond these principles. As matters stand, the European Court has held that long-term homosexual relationships do not fall within the scope of Article 8. Even assuming the learned trial judge to have identified any statutory provision or rule of law to which this interpretative obligation is to be applied, it is necessary to consider whether section 2 obliged him to adopt the interpretation he chose. It must, firstly, be recalled that Irish law is to be interpreted *"subject to the rules of law relating to such interpretation and application."* For reasons already given, I believe that is clear that the claimed *de facto* family consisting of the mother, B.M. and the child does not exist in Irish law. A court can only depart from that national-law interpretation for the purpose of making any such national rule compatible with the State's obligations under the Convention. The existing case-law of the European Court seems clearly to be to the effect that a *de facto* family of the sort claimed does not come within the scope of Article 8. Thus, insofar as judicial notice is accorded, by virtue of section 4, to the case-law of the European Court, it tends to the opposite conclusion to that adopted by the High Court.

103. The learned judge identifies a movement or trend in the case-law and decides to move in that direction. The Attorney General refers to the decision of the House of Lords in *M v. Secretary of State for Work & Pensions* [2006] 2 AC 91. The case concerned an application by the divorced mother of two children who lived with her same-sex partner.

She claimed that she should have been assessed for the purposes of child support contributions as if she had been living with a man. In substance it was a discrimination claim, though Article 8 was also relevant. The appellant made the claim that the difference in treatment of same sex couples breached Article 8 and 14 of the Convention. Lord Nicholls considered the effect of the decisions in *Mata Estevez* and *Karner*. They showed that English law was not subject to scrutiny by the European Court. He went on:

> *"It goes without saying that it would be highly undesirable for the courts of this country, when giving effect to Convention rights, to be out of step with the Strasbourg interpretation of the relevant Convention Article".*

104. It is vital to point out that the European Court has the prime responsibility of interpreting the Convention. Its decisions are binding on the contracting states. It is important that the Convention be interpreted consistently. The courts of the individual states should not adopt interpretations of the Convention at variance with the current Strasbourg jurisprudence.

105. I am satisfied, for these reasons, that the very detailed and careful examination by the learned trial judge of the notion of *de facto* family cannot be relevant to the issues to be determined in this case. Neither the Constitution nor the law in force in Ireland recognise persons in the position of the respondents as constituting a family with the natural child of one of them. None of the foregoing means that the present legal situation will continue unaltered at either international or national level. National legislation may address these difficult problems. Changes in the Strasbourg jurisprudence are to be expected. The legal principle is important. The courts must respect the boundaries laid down by Article 29 of the Constitution. The Act of 2003 does not provide an open-ended mechanism for our courts to outpace Strasbourg.

106. It seems clear that the reasoning of the High Court was influenced by the desire not to disrupt the *de facto* family said to consist of the mother and B.M. with the child. Following his conclusion on this point the learned judge said:

> *"The significance of this herein is that because P.L., B.M. and the child., the child, enjoy rights as a de facto family, this is a factor which must come into play in determining the central question in this case which is whether the father should be granted guardianship rights such as would ensure he had access to the child."*

Welfare of D

107. The final matter is the correctness of the High Court judgment on the question of the best interests of the child. The learned trial judge very clearly preferred the evidence of Dr. Byrne and was critical of Dr. Antoinette Dalton on the central point that it would not be possible for the respondents to agree access arrangements for the father without causing psychological damage to the child.

108. As part of his reasoning, the learned trial judge ruled that the court should follow the recommendations of the psychiatrist appointed to report to the court pursuant to section

47 of the Act of 1995. He found support for his view in the decision of the Court of Appeal in England in *Re W. (Residence)* [1999] 2 FLR 390. There Thorpe L.J. criticised the judge of first instance for unreasoned departures from the recommendations of a court welfare officer. He emphasised that:

> *"…in private law proceedings, the Court welfare service is the principal support service available to the judge in the determination of these difficult cases. It is of the utmost importance that there should be free co-operation between the skilled investigator, with the primary task of assessing not only the factual situations but also attachments, and the judge with the ultimate responsibility of making the decision."*

109. I would not disagree with the learned trial judge that great respect should be accorded to the report prepared for the court pursuant to section 47. He was certainly entitled to attach particular weight to the very thorough and carefully prepared report of Dr Byrne, an expert of high repute, in this case. However, it was not right to erect a principle that the court could depart from any section 47 reports only *"for grave reasons."* The court should not preclude itself from disagreeing with a report, where a persuasive contrary view is available in the evidence. There is no reason to depart from the ordinary rules of evidence. This is a civil matter, where disputed matters of fact are determined on the balance of probabilities. In *Re W*, there was no contrary report. The principal and repeated criticism expressed by Thorpe L.J. of the trial judge in that case was that he had failed to give reasons for his departure from the recommendations of the child welfare officer.

110. Nonetheless, and in spite of that point of disagreement, I think it is clear that the learned trial judge clearly preferred the report of Dr. Byrne on its own merits and did not accept the report or evidence of Dr. Dalton. He was entitled to do so. It is necessary then to examine the learned trial judge's own reasoning for ruling that the father should have no access to the child. It bears repeating that he accepted, as did Dr. Byrne, that, *"in general, it is beneficial to a child to have access to both its natural parents,"* though he immediately qualified this statement by saying that *"there may be circumstances where this is not so."* In reliance on Dr. Byrne, he concluded that there were such circumstances in the present case. They were:

> *"They are essentially that the relationship between the father, P.L. and B.M. is so poor that only conflict of a psychologically damaging kind to the child is likely to occur. He bases this opinion on his finding that P.L. and B.M. consider themselves betrayed, deceived and violated by the applicant. He does not think that the father did actually deceive them but nonetheless believes that their feelings in this regard are genuine and that this is a very important and fundamental matter. There is no trust between the parties and he finds it difficult to see how they could ever co-operate in such a way that would not expose the child to conflict.*
>
> *In my view, the evidence has amply confirmed Dr. Byrne's view in this regard, save that I do not agree with his view that the applicant did not deceive the respondents*

as to his true intentions in entering into the sperm donation agreement. I think he did as I have found above. In consequence, it seems to me that the respondents have, in fact, substantial grounds for their feelings of betrayal and violation and this, in my view, lends even more weight to Dr. Byrne's opinion."

111. I have several difficulties with this passage. Firstly, as I have already said, it was never put to the father in evidence that he had deliberately deceived the respondents. It might be said that whether he did or not does not bear on the welfare of the child. However, it seems to have played a crucial part in the judge's reasoning. It enabled him to conclude that the mother's feelings of violation by the father were rational. As noted above, part of that very complaint was that the mother felt she was being used as a *"surrogate"* mother. It is perfectly clear that no such question ever arose. Moreover, the learned judge here, in spite of his general preference for the section 47 report, rejects a careful conclusion of Dr Byrne, reached after interviewing all of the parties at length and he does not explain how he came to that view.

112. At a more general level, it seems to me also that the central point in the judge's reasoning raises a difficult point of possible general application. The Court had to address a situation of a somewhat similar kind in *N. & anor. v. Health Service Executive & ors.* [2006] IESC 60, where the Court decided to return a child from its intended adoptive parents and where the adoption had not gone ahead due to the intervening marriage of the natural parents. A significant obstacle raised was that the respondents would be unable to cooperate in the change of custody and that this would damage the child. Hardiman J. examined whether the respondents could exercise a "veto" over the transfer of custody. In the present case, it appears to me that the final decision of the High Court leaves unresolved the question of when, if at all, the child will be permitted contact with or even knowledge of his biological father. The judge left the matter on the following basis:

"I further note the evidence of the respondents which I believe to be entirely genuine that their wish is that the child should know the identity of his biological father – that after all was the whole point of this agreement – and that he should have contact at an age appropriate time."

113. The learned trial judge, as I have already noted, came to the conclusion that the respondents constitute a *de facto* family with the child, cognisable in Irish Law, for the purposes of Article 8 of the Convention. This conclusion played a significant part in the reasoning which led him to conclude that there should not be access. He said:

"It is in this context that the Court should weigh the claim by the respondents that the integrity of their family would be violated by any order of guardianship or access in favour of the applicant."(emphasis added)

114. He found that:

"The child currently lives in a loving, secure de facto family."

115. I am satisfied that these conclusions are erroneous. The respondents do not form a *de facto* family in Irish law. P.L., as the mother of the child, has a natural right guaranteed by the Constitution to his custody and to look after his general care, his nurture, his physical and moral wellbeing and his education, in every respect. The child has corresponding rights as a human person to those benefits. B.M. has no legally or constitutionally recognisable family relationship with the child.

116. The father has statutory rights to apply for guardianship and other orders. Insofar as guardianship is concerned, I would dismiss the appeal for the reasons given by Geoghegan J. in the judgment which he has delivered. It is, of course, possible that a time will come when such an application might be renewed in the High Court in different circumstances. Whether orders permitting contact or access between the father and the child will be made must depend on whether their making would be in the interests of the child, not those of the father. The dispute between the psychiatrists was a comparatively narrow one. They disagreed only as to the time at which the child should be introduced to and have contact with the father. It would not be possible for this Court to make appropriate orders. In my view, the entire matter should be reconsidered by the High Court, in the light of the considerations set out in this judgment. The High Court cannot treat the mother, B.M. and the child as constituting a *de facto* family cognisable in Irish law. It will have to resolve the difficult question of the best interests of the child and will be perfectly entitled to consider the evidence of Dr. Byrne and any other child psychiatrist.

117. I would, therefore, allow the appeal in that respect only and remit the matter to the High Court. I would make an order in the terms suggested by Denham J.